

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-216236

DATE: December 11, 1984

MATTER OF: NEFF Instrument Corporation

DIGEST:

1. Protester alleging that contracting agency unlawfully appropriated proprietary data and designs and that contracting agency will improperly furnish equipment manufactured by protester to awardee in violation of protester's rights to proprietary data and designs, even though not a bidder under this procurement, has direct economic interest in outcome of protest. Therefore, protester is an "interested party" entitled to protest in accord with section 21.1(a) of GAO Bid Protest Procedures.
2. Where protester contends that contracting agency violated protester's rights to certain proprietary data and designs, protester must bear burden of proving its case by providing clear and convincing evidence to support its claims. Protester has not met burden of proof where record shows that IFB does not contain any proprietary data and pertinent technical data was not provided to contracting agency in confidence nor identified as proprietary when supplied to the agency. Moreover, equipment manufactured by protester to be furnished by agency to awardee under contract is standard commercial item available to public and cannot be considered proprietary in nature.
3. Allegation that awardee may use government-furnished equipment made by protester and supplied to agency under different contracts to copy protester's proprietary designs is not for adjudication by GAO. Even if awardee does use government-furnished equipment to copy designs, such matter involves a dispute between private parties concerning patent infringements which are not matters for GAO consideration.

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NEFF Instrument Corporation (NEFF) protests award of a contract to any other firm by the Department of the Air Force pursuant to invitation for bids (IFB) No. F40650-84-B-0077, issued by the Arnold Engineering Development Center for the design, manufacture, and testing of a D.C. differential amplifier set, including amplifiers, power supplies, logic interfaces, rack mounting assemblies, and interconnecting cables. The IFB states that the Air Force will supply one analog-to-digital conversion system to the contractor as government-furnished equipment and specifies that this analog-to-digital conversion system will consist exclusively of certain NEFF components. NEFF contends that the Air Force has unlawfully appropriated NEFF's proprietary designs and technical data and that the Air Force proposes to provide NEFF equipment to the awardee to facilitate the copying of NEFF proprietary designs.

We deny the protest.

The Air Force points out that NEFF did not submit a bid in this procurement and, therefore, cannot be awarded a contract under this IFB even if we sustain the protest. Accordingly, the Air Force concludes that NEFF is not an "interested party" with standing to protest in accord with section 21.1(a) of our Bid Protest Procedures. 4 C.F.R. part 21 (1984). We disagree with the Air Force's conclusion.

The "interested party" requirement set forth in our Bid Protest Procedures serves to ensure that the protesting party has a sufficient stake in the outcome of a protest. ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 C.P.D. ¶ 245. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and how these circumstances show the existence of a direct or substantial economic interest on the part of the protester. See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 C.P.D. ¶ 374.

We conclude that NEFF has a direct economic interest in protecting its proprietary data and designs and, therefore, has a sufficient stake in the outcome of this protest. In a number of previous cases, we have considered claims of misuse of proprietary data "in order not to give any

semblance of approval to improper disclosures of data and so as not to expose the Government to liability for damages resulting from the disclosure." See John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 C.P.D. ¶ 249; and Kisco Company, Inc., B-200831.2, Feb. 26, 1981, 81-1 C.P.D. ¶ 149, and cases cited therein. In appropriate circumstances, where it is clear that the government's use of proprietary data or trade secrets in a solicitation violates a firm's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the protester, or, if possible, cancel the solicitation and resolicit without using the protester's data. White Machine Company, B-206481, July 28, 1982, 82-2 C.P.D. ¶ 89; 49 Comp. Gen. 28 (1969); 43 Comp. Gen. 193 (1963). Accordingly, we conclude that NEFF, which allegedly owns the proprietary designs and technical data and which will allegedly suffer economic harm if such data is improperly disclosed by the Air Force, is sufficiently "interested" to protest to our Office. Cf. White Machine Company, B-206481, supra.

The protester must bear the burden of proof if it is to prevail on its claims that the Air Force has appropriated proprietary data and designs and that the Air Force intends to supply NEFF equipment so that the awardee can copy NEFF's proprietary designs. Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 C.P.D. ¶ 305. The Air Force reports that the technical staff at the Arnold Engineering Development Center reviewed the NEFF literature available to it and the specifications in the IFB and ascertained that there is nothing of a proprietary nature in the IFB. Moreover, the Air Force reports that none of the NEFF literature in its possession had been identified by NEFF as proprietary when NEFF supplied it to the Air Force. Although the IFB specifies that certain NEFF equipment will be given to the contractor by the Air Force, the record shows that this equipment is standard, off-the-shelf equipment, commercially available to other firms and widely distributed throughout the United States. The NEFF analog-to-digital conversion system is to be furnished to the awardee to insure that the amplifiers and interconnecting wiring supplied by the awardee are compatible with the NEFF equipment purchased by the Air Force under other contracts. The protester has not shown that it gave technical data or supplied the components of its analog-to-digital conversion system to the Air Force in confidence. Moreover, since

the NEFF equipment is publicly available, it cannot be considered to be proprietary or a trade secret. See Porta Power Pak, Inc., B-196218, supra. In these circumstances, we conclude that the Air Force did not improperly reveal NEFF proprietary data nor will it improperly supply NEFF equipment as government-furnished property. NEFF has merely made allegations to that effect but has not supported its case with clear and convincing evidence. Therefore, NEFF has not carried its burden of proof. See Porta Power Pak, Inc., B-196218, supra.

NEFF suggests that the awardee will use the NEFF equipment furnished by the Air Force to copy NEFF designs. To the extent that NEFF's equipment is protected by United States patents, our Office does not consider allegations of possible patent infringements. VSI Corporation, Aerospace Group, B-211024, Apr. 4, 1983, 83-1 C.P.D. ¶ 352. Furthermore, such future improper actions would amount to a dispute between private parties and would not be for adjudication by this Office. See Genasys Corporation, B-213830, Jan. 23, 1984, 84-1 C.P.D. ¶ 102; James G. Tunison & Co., B-213394, Dec. 29, 1983, 84-1 C.P.D. ¶ 38.

In view of the above, we deny the protest.

Milton J. Fowler
for Comptroller General
of the United States